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In The

# Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.,

*Petitioner,*

v.

ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Arizona**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Whether a capital conviction obtained without providing for a unanimous, or even a majority, vote of the jury violates the Sixth, Eighth and Fourteenth Amendments?

2. Whether a state may avoid a capital defendant's exercise of his Eighth and Fourteenth Amendment rights under *Beck v. Alabama* by denying that a necessarily included offense is a "lesser included offense" under state law?

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## OPINION BELOW

The opinion of the Supreme Court of Arizona affirming petitioner's conviction and sentence of death is reported in *State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), and reproduced at J.A. 30-55.

## JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Arizona was entered on December 14, 1989. The motion for reconsideration was denied on April 17, 1990. The Petition in this case was timely filed on August 16, 1990.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

The Sixth Amendment, which provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

The Eighth Amendment, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, which provides, in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves the following state constitutional provision:

Art. 2, §23 of the Arizona Constitution provides in part:

Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict . . .

The following statutory provision is also involved in this case:

**Ariz. Rev. Stat. §13-452 (1973). Degrees of murder.**

A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree.



## STATEMENT OF THE CASE

### A. The Offense.

On August 1, 1978, Lorimer Grove left Bisbee, Arizona, on a trip to Everett, Washington. Eight days later, Mr. Grove's body was found by the side of a highway, near Prescott, Arizona. Tr. 2:340; 3:565; Tr. 2:286-287[1]. A rope was tied around his neck. The medical examiner concluded that Mr. Grove had died of ligature strangulation. Tr. 2:361. Nothing else about the circumstances of his death is known.[2]

A few days later, a Ford automobile rented by petitioner eight months earlier in Utah and never returned, was found near the highway, thirty miles north of Flagstaff, Arizona, and 150 miles from where Mr. Grove's body was found. Tr. 3:414-415; 453-454; 5:882, 1032-1033. A homemade mirror device found inside the car was identified at trial as similar to one seen at Mr. Grove's residence. Tr. 3:495; 2:343.

Petitioner was arrested in Utah on September 8, 1978, for possession of a stolen automobile. Tr. 4:625, 626. At

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[1] "Tr." refers to the transcript of the guilt-innocence trial, followed by the volume and page numbers cited. "Tr." preceded by a date refers to transcripts of proceedings other than the guilt-innocence trial, which are identified by date.

[2] During this time, a statewide manhunt was being conducted for the "Tison gang." See *Tison v. Arizona*, 481 U.S. 137, 139-142 (1987); Tr. 3:409; 5:1035. The "Tison gang" escaped from the Arizona State Prison on July 30, 1978, and on August 1, 1978, was believed to be travelling through the area where Mr. Grove's body was found, and where the abandoned Ford was found. Tr. 5:900-901; 913-914.

the time of his arrest, petitioner was driving Mr. Grove's car and had his credit cards. Tr. 4:627-628; 683-685. Petitioner had begun using the credit cards on August 2, 1978. Tr. 5:923, 945.

Shortly after his arrest, petitioner was visited by John Duncan who had arranged with the police to talk to petitioner and to provide them with any information petitioner gave him.[3] Tr. 4:820, 850-851, 853. According to Duncan[4], petitioner said that he would deny being in Arizona, "particularly Tempe, Arizona and Prescott, Arizona." Tr. 4:825. This statement was made without reference to date, context or purpose.

No other evidence incriminated petitioner.

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[3] Duncan first met petitioner the day before he was arrested when petitioner came to his former girlfriend's house where Duncan and his wife were staying. Tr. 4:818, 831. Duncan had fled to Utah from California to avoid going to prison. Tr. 4:831. Duncan had recently been arrested in Utah on a California fugitive warrant. Tr. 4:822. At the time he met petitioner, Duncan was still awaiting extradition to California for probation revocation, fugitive from justice, grand theft auto, burglary and receiving stolen property charges. Tr. 4:829-830. After meeting Schad, Duncan contacted a Utah police officer, Ken Halterman, and told him that petitioner was driving a stolen car. Tr. 4:819. Halterman denied that Duncan was his informant, although Halterman told the Arizona authorities that Duncan was. Tr. 4:646; 5:887. Halterman admitted that he gave Duncan his unlisted home phone number, helped Duncan obtain a reward from Mr. Grove's credit card company, and tried to help Duncan on his California charges by writing a letter to the California authorities. Tr. 4:646-647, 650-651

[4] Although Duncan testified that he immediately told Officer Halterman about this statement, Tr:853, Halterman testified that he knew nothing about any connection between petitioner and Prescott, Arizona until he was contacted by Arizona authorities over a month later. Tr. 4:666.



**B. The Trial.**

Petitioner was indicted for the murder of Mr. Grove under A.R.S. §13-452. J.A. at 2. That statute defines first degree murder as "[a] murder which is [a] wilful, deliberate or premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate, . . . robbery."

The defense case at trial, like the state's case, was based on inferences drawn from circumstantial evidence. No direct evidence existed that petitioner murdered Mr. Grove. The defense argued that the circumstantial evidence proved only that petitioner was a thief, not a murderer. J.A. at 23.

The prosecutor argued from the same circumstantial evidence that the jury could convict petitioner of either premeditated murder or felony murder. J.A. at 6-7. Pointing to the easel where he had written the three elements of premeditated murder and the two elements of felony murder, the prosecutor explained to the jury the "two types of first degree murder":

> On the left is premeditated murder. There are three elements to that. One, that the defendant caused someone's death. Secondly, that he do [sic] so with malice . . . [a]nd . . . attached to that killing is a third element, that of premeditation which simply means that the defendant contemplated that he would cause death, he reflected upon that.

J.A. at 6. He then discussed the "other type of first degree murder", "what we call felony murder":

> It only has two components [sic] parts. One, that a death be caused, and, two that death be

caused in the course of a felony, in this case a robbery.

*Id.* The prosecutor then told the jury that "both types of first degree murder apply." J.A. at 7. He argued that the murder was premeditated because the victim was strangled with a rope and that the murder was felony murder because the simple fact that the victim "was found without his car, without his credit card, without the ring, [showed] that he was the victim of a robbery." Tr. 7:1349.

Underscoring the prosecutor's argument, the judge instructed the jury that "[f]irst degree murder is murder which is the result of premeditation" and also is "[m]urder which is committed in the attempt to commit robbery." J.A. at 26. The jury was told that "[a]ll 12 of you must agree whether the verdict is guilty or not guilty." J.A. at 27. The jury was then given three forms of verdict, guilty of first degree murder, guilty of second degree murder and not guilty. J.A. at 27-28. The judge refused defense counsel's request to instruct the jury on the lesser-included offenses of felony murder which were supported by the evidence: robbery and theft. Tr. 7:1343.

The jury returned the verdict finding petitioner guilty of "first degree murder". J.A. at 29. Following the aggravating/mitigation hearing, the trial judge sentenced petitioner to death. Tr. August 29, 1985:10.

### C. The Appeal.

In affirming petitioner's conviction and sentence, the Arizona Supreme Court rejected petitioner's constitutional challenges to the single form of verdict and failure



to instruct on the lesser-included offense of felony murder. Noting that petitioner's arguments on the form of verdict issue "have all been previously decided by this Court and rejected", the court stated that the single form of verdict was not error "even though both premeditation and felony murder were . . . submitted to the jury" because there is only one crime of first degree murder in Arizona. J.A. at 41. Acknowledging that the evidence supported a conviction for robbery, the court similarly rejected petitioner's challenge to the failure to instruct on the lesser-included offenses by reiterating its oft-stated rule that "in Arizona there is no lesser-included offenses to felony murder." J.A. at 40.

## SUMMARY OF ARGUMENT

This is a capital case. It is a case where this Court has insisted on reliability at all stages of the proceedings. *Beck v. Alabama*, 447 U.S. 625, 638 (1980), *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Of all places, this is where the principle announced in *In re Winship*, that an accused cannot be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the elements of the crime with which he is charged, must be accepted as the essential ingredient of due process. It is also the place where the Sixth Amendment jury trial right demands a fact-finding procedure which produces a reliable verdict of a capital defendant's guilt.

Two long-standing Arizona rules combined to violate petitioner's constitutional right to a reliable verdict. First,

although Arizona purports to require the jury to unanimously agree on the verdict in capital cases, it includes two conceptually and factually different offenses, premeditated murder and felony murder, under the rubric of first degree murder. If a prosecutor seeks conviction based on alternative factual theories, Arizona procedure permits the jury to convict when no more than six jurors are convinced beyond a reasonable doubt as to what it was petitioner did. This result is patently inconsistent with the heightened degree of reliability required by due process and the Sixth Amendment in capital cases and cannot be tolerated where the defendant stands to lose his life.

Next, after depriving petitioner of a unanimous verdict, Arizona law denied him a jury instruction on his sole defense presented at trial. It did so by mandating, without explanation, that there are no lesser-included offenses to felony murder. Thus, notwithstanding that, as the Arizona Supreme Court recognized, the evidence would have supported a conviction for the lesser-included offense of robbery, petitioner's jury was not given that option. The jury's only option was to convict him of some kind of homicide or let him go. That mechanically-applied rule violates the due process principles set forth in *Beck v. Alabama*.



## ARGUMENT

### I. ARIZONA'S PROCEDURE ALLOWING A JURY TO CONVICT A CAPITAL DEFENDANT WITHOUT AGREEMENT AS TO WHAT THE DEFENDANT DID VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

Arizona, like every other capital punishment state[5], requires a unanimous jury verdict in capital cases. Ariz.

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[5] *Way v. State*, 155 Ala. 52, 46 So.2d 273 (1908); ARK. CONST. Art. II, §10; *Ashby v. State*, 611 S.W.2d 512 (Ark. 1981); Cal. Penal Code §1149 (Deering 1971); Colo.Rev.Stat. §16-10-108 (1986); *State v. Ralls*, 167 Conn. 408, 356 A.2d 147 (1974); DEL. CONST., Art. I, §14; Del.Super.Ct.Crim.R. 31(a); *Fountain v. State*, 275 A.2d 251 (1981); Fla.Crim.R.P. 3.440; *Williams v. State*, 438 So.2d 781 (1983); GA. CONST., Art I, ¶ XI (1989); *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983); IDAHO CONST. Art. I, §7 (1990); Ill.Rev.Stat. ch.38, §115-4 (1988); *People v. Maxey*, 37 Ill.App.3d 905, 346 N.E.2d 51 (1976); *Jackson v. State*, 490 N.E.2d 1115 (Ind. 1986); Ky.Rev.Stat.Chap. 29A.280 (1988); La.Code Crim.P. Art. 782 (1981); MD. CONST., Art. 21 (1981); *Allew v. State*, 77 Md.App. 537, 551 A.2d 156 (1989); *Markham v. State*, 46 So.2d 88 (Miss. 1950); Mo.Crim.R.P., Rule 29.01 (1990); MONT. CONST. Art. II, §26; Mont.Code Ann. §46-16-603(1)(1989); *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986); Nev.Rev.Stat. §175.481 (1987); *State v. Almy*, 67 N.H. 274, 28 A.2d 372 (1892); *State v. Gadson*, 148 N.J.Super. 457, 372 A.2d 1143 (1977); N.M. CONST. Art. II, §12; Op. Att'y Gen. No. 72-31 (1972); N.C. CONST. Art. I, §24 (1984); *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); Ohio Criminal Rule 31(A); OKLA. CONST. Art.2, §19 (1981); ORE. CONST. Art. 1, §11 (1989); 42 Pa.C.S.A. R.Crim.P., Rule 1120; S.C. CONST. Art. 5, §22 (1989); S.D.Cod.Laws, Title 23A-26-1(1988); Tenn.R.Crim.P., Rule 21 (1990-91); TEX. CONST. Art. V, §13; Tex.Code Crim.P.Ann. §36.29; UTAH CONST. Art. 1, §10; VA. CONST. Art. 1, §8; WASH. CONST. Art. 1, §22; Amend. 10; *State v. Stephens*, 93 Wash.2d 186, 607 P.2d 304 (1980); 1 Wyom.Stat. §7-11-501 (1987).

Const. art. 2, §23. For petitioner, however, Arizona's rule of jury unanimity became a hollow formalism. Because the prosecutor sought conviction on alternative factual theories of premeditated and felony murder, the jurors were allowed to concur in a verdict finding that petitioner committed "first degree murder" without ever reaching unanimous agreement – or even majority consensus – on the underlying facts constituting the elements of the first-degree offense. This procedure violates petitioner's right to a unanimous jury verdict based on proof beyond a reasonable doubt of every fact necessary to establish the crime for which he was charged; it unconstitutionally erodes the reliability of the verdict on which his death sentence stands.

**A. Jury Unanimity Is Constitutionally Required in Capital Cases.**

"In [*In re*] *Winship*, [397 U.S. 358, 364 (1970)], this Court stated:

> 'Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charge' *Id.*, at 364 (emphasis added)."

*Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); see also, *e.g.*, *Francis v. Franklin*, 471 U.S. 307, 313 (1985). "The standard of proof beyond a reasonable doubt, said the Court [in *Winship*], 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to



ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S., at 363." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). "*Winship* expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error'." *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972), quoting *Winship*, 397 U.S. at 363. It was "developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property," *Brinegar v. United States*, 338 U.S. 160, 174 (1949), and is grounded on the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring.)

By reducing the risk of factual error in the conviction, the reasonable doubt standard not only promotes reliability of the jury verdict, but also ensures community confidence in the criminal justice system. "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, 397 U.S. at 364. This is another reason why "the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt,'" *Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978), quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

Historically as well as logically, there is a close connection between the beyond-a-reasonable-doubt standard and the rule requiring jury unanimity in criminal cases. Although arising from other wellsprings prior to its full

emergence in the Fourteenth Century,[6] the unanimity requirement subsequently came to be identified as a guarantee of the standard of certainty expressed in the beyond-a-reasonable-doubt formulation. For example, in Sir Matthew Hale's HISTORY OF THE COMMON LAW OF ENGLAND, published posthumously in 1713 before the beyond-a-reasonable-doubt standard was firmly established, Hale defended the "excellent Order of Trial by Jury, which is far beyond the Trial by Witnesses according to the Proceedings of the Civil Law" because "it has all the Helps to investigate the Truth that the Civil Law has, and many more. For as to Certainty, . . . . It has the unanimous Suffrage and Opinion of Twelve Men, which carries in itself a much greater weight and Preponderance to discover the Truth of a Fact, than any other Trial whatsoever." *Id.*, at 166-67 (1971). Writing two centuries later, after the beyond-a-reasonable-doubt rule had become axiomatic,[7] Sir James Fitzjames Stephen described the relationship more directly:

> The justification of the [unanimity] rule, now that the character of the jury has changed from that of witnesses to that of judges of fact, seems to be that it is a direct consequence of the principle that no one is to be convicted of a crime unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this

[6] See II POLLOCK (SIR FREDERICK) & MAITLAND (FREDERIC W.), THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed., Cambridge University Press, reissued & reprinted 1984).

[7] The reasonable-doubt rule "seems to have had its origin no earlier than the end of the 1700's and to have been applied at first only in capital cases." 9 WIGMORE (JOHN HENRY) 405 [2497] (Chadbourn re. 1981).



> condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt? . . . My own opinion is that trial by jury has both merits and defects, but that the unanimity required of the jurors is essential to it. If that is to be given up, the institution itself should be abolished. There is a definite meaning in the rule that criminal trials are to be decided by evidence plain enough to satisfy in one direction or the other a certain number of representatives of the average intelligence and experience of the community at large, but if some of the members of such a group are of one opinion and some of another, the result seems to be that the process has proved abortive and ought to be repeated.

I STEPHEN (SIR JAMES FITZJAMES), A HISTORY OF THE CRIMINAL LAW OF ENGLAND 304-05 (1883).

To be sure, this Court has held that jury unanimity is not indispensable to the constitutionality of every criminal verdict. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Like the exact size of the jury, the unanimity requirement and other related rules are amenable to modification that do not subvert the essential functions of the right to jury trial. See *Williams v. Florida*, 399 U.S. 78 (1970). But the Court has steadfastly insisted that those functions include "assur[ing] the reliability of . . . [the jury's] verdict" and " 'the very integrity of the fact-finding process,' " *Brown v. Louisiana*, 447 U.S. 323, 334 (1980), quoting *Linkletter v. Walker*, 381 U.S. 618, 639 (1965), by subjecting the evidence of guilt to "evaluation by the sense of the community," *Ballew v. Georgia*, 435 U.S. 237, 238 (1978). So, where reductions in the size of the jury, in the proportion of jurors required to vote to convict, or in both result in a

leaching away of sufficient confidence in the jury's verdict as a reliable determination of the facts on which severe criminal penalties depend, the Fourteenth Amendment Due Process line is reached. *Johnson v. Louisiana*, 406 U.S. at 362 (White, J., concurring ["substantial majority of the jury" required to vote to convict]); *id.*, at 366 (Blackmun, J., concurring ["a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty"]); *Ballew v. Georgia, supra* (jury of five is too small); *Burch v. Louisiana*, 441 U.S. 130 (1979) (nonunanimous jury of six is too few). As the Court later observed in *Brown v. Louisiana*, "a line must be drawn somewhere, . . . the constitutional inviolability of that line must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired," 447 U.S. at 331, and in drawing the line, this Court has given prominent recognition to the concern that decreasing the number of jurors needed to vote for conviction on a particular finding of fact "leads to less accurate factfinding and a greater risk of convicting an innocent person," *id.*, at 332.

It is against this background that we come to the question of the constitutionality of a state practice which allows a capital conviction and a death sentence to rest upon two alternative factual findings neither of which has to have obtained the assent of more than 6 out of the 12 members of the jury. Everything this Court has written on the subject of criminal jury trials *or* the subject of the death penalty points to a single answer to that question. Reductions in the number of jurors who have to vote for conviction have never been approved in a capital case; to the contrary, the Court has taken care to distinguish the cases at issue as noncapital. *Williams v. Florida*, 399 U.S. at



103 ("In capital cases, . . . it appears that no State provides for less than 12 jurors – a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty."); *Johnson v. Louisiana, supra* (state constitutional provision required unanimous jury verdict in capital case); *Apodaca v. Oregon, supra* (same). See also *Burch v. Louisiana*, 441 U.S. at 136. This is in keeping with the Court's consistent recognition that in capital cases both the guilt and penalty determinations must be structured to assure heightened reliability, not to permit findings whose reliability is diminished. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). To ensure the requisite degree of reliability, this Court has required additional safeguards not present in noncapital cases. *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights"); *id.* at 77 (Harlan, J., concurring).

This Court has also accepted without question that the degree of confidence that society should have in the correctness of factual conclusions stands in direct relation to the potential harm caused by an incorrect factual determination. *E.g., Bell v. Burson*, 402 U.S. 535, 540 (1971); *Winship*, 397 U.S. at 371-374 (Harlan, J., concurring). Jury

unanimity ensures the protection of the reliability concerns which are paramount in capital cases.[8] It requires the state to prove the facts on which a defendant is convicted beyond a reasonable doubt to the minds of all the jurors. The reasonable doubt standard embodied in the due process clause and effectuated by jury unanimity, thus, "serves to allocate the risk of error . . . and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Jury unanimity also inspires community confidence that a guilty verdict in the most serious of crimes will not be reached without overcoming the reasonable doubts of all the jurors. In short, jury unanimity:

> is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community.

*McKoy v. North Carolina*, 110 S.Ct. 1227, 1238 (1990) (Kennedy, J., concurring).

This Court should now say what it has implied but left unsaid in an unbroken string of cases, and what every capital punishment state has recognized: jury unanimity in capital cases is essential to our notions of reliability, accuracy and community faith in jury verdicts embodied

[8] Empirical research demonstrates that jury unanimity produces more thorough deliberations with more participation by minority viewpoints. Hastie, R., Penrod, S., and Pennington, N., *Inside the Jury*, 238 (1983); Hans, V.P., and Vidmar, N. *Judging the Jury*, 171-175 (1986).



in the due process clause and Sixth Amendment right to jury trial.[9]

**B. This Is Not a Unanimous Verdict.**

The verdict in this case cannot be squared with the constitutional requirement of jury unanimity in guilt/innocence determinations in capital cases. That requirement includes the unanimous agreement of the jurors upon some version of the facts which comprises every element of the capital offense. "The unanimity rule . . . requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977).[10] "Unanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). See also *United States v. Beros*, 833 F.2d 455, 461 (3rd Cir. 1987).

In petitioner's case, no such agreement was demanded. Instead, the prosecutor was permitted to

[9] Even if jury unanimity in a capital case is not a federal constitutional right, this same result should obtain. Once a given rule has weaved its way into the system through which criminal justice is administered, it cannot be ignored by a state. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14.

[10] Gipson was a federal noncapital case where the federal unanimity requirement applies *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

obtain a conviction by persuading half the jury of each of two independent, alternative factual scenarios. The prosecutor's closing argument was a classic instance of attempted persuasion by simplification. It presented two distinct theories of first-degree murder, each resting on a single salient fact declared to be self-evident. The two theories might have been drawn from the same or from wholly different chains of events.

The prosecutor graphed them for the jury on an easel, setting out the "two ways for first degree murder to be committed." J.A. at 6. The first was "premeditated murder," which had "three elements" including "premeditation, which simply means that the defendant contemplated that he would cause death." *Id*. The "other type of first degree murder is what we call felony murder," having "only . . . two component parts". *Id*.

"In this case," the prosecutor argued, "both types of first-degree murder apply." J.A. at 7. The argument for premeditated murder was based exclusively on a discrete factual proposition: that Mr. Grove was strangled with a thin rope and "strangling the . . . life out of someone with a rope is probably one of the best examples we can think of of premeditation." Tr. 7:1349. The argument for felony murder was based exclusively on a different factual proposition: that petitioner's connection with the murder was proved by his possession of Mr. Grove's personal effects – car, credit cards, etc.; *ergo* Mr. Grove "was the victim of a robbery." *Id*. Both of these independent factual propositions were refined to a filament of logic. Alternative possible factual scenarios, such as an accidental killing by strangulation in the course of a medically recognized form of deviant sex play (which would be second degree



murder in Arizona) or a malicious, but undeliberated, murder followed by the formation and action upon an intent to steal the victim's personal effects (also second degree murder) were ignored as insufficiently elegant. Because of either of two independent facts – strangulation and Petitioner's possession of Mr. Grove's effects – the prosecutor argued that "in this case there really is no question that a first degree murder was committed, and I won't discuss that any further with you." Tr. 7:1349. See also J.A. at 6-7, turning the rest of the summation to "what the issue in this case is" – "the defense . . . that maybe somebody else did it."

The constitutional trouble, however, is that under Arizona procedure the prosecutor needed to convince no more than six jurors of either of the two alternative factual propositions on which petitioner's conviction and death sentence depend. If six jurors accepted and six rejected the use-of-a-rope-as-premeditation-*per-se* logic and six accepted while six rejected the possession-of-recently-stolen-personal-property logic, the cumulation of two less than majority votes by the jury would require a conviction despite the lack of any basis for confidence that even one more juror believed than disbelieved a set of facts necessary to establish petitioner's guilt of first degree murder.

This lack of factual agreement by the jury defeats the very purpose of the constitutional right to jury trial. Without some assurance that there has been a group deliberation resulting in a consensus about those facts the state has proven beyond a reasonable doubt which satisfy the statutory definition of the elements of the crime charged, the reliability requirement of due process and

the Sixth Amendment cannot be satisfied. Here, no such assurance was provided. In essence, the jury was allowed to convict petitioner of capital murder on no more than a general agreement that he was a criminal. This is constitutionally impermissible in any case. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (statute criminalizing being a "gangster" violates due process). In a capital case, it is unconscionable.

## II. ARIZONA'S PROCEDURE VIOLATED THE CLEAR MANDATE OF *BECK V. ALABAMA* BY DENYING PETITIONER'S JURY THE OPTION OF CONVICTING HIM ON A NECESSARILY LESSER-INCLUDED OFFENSE.

While the State took advantage of the absence of direct evidence at petitioner's trial by presenting alternative theories of guilt without requiring the jury to endorse either theory, it cut off petitioner's opportunity to use a similar approach in his defense. The trial evidence supported the inference that petitioner was not guilty of felony murder but guilty of the lesser-included offenses of robbery or theft. Petitioner could not present those alternative inferences, however, because the court did not instruct the jury on robbery or theft. This error alone would require reversal of petitioner's capital conviction on due process grounds. The absence of lesser-included instructions together with the use of the procedures that lessened the State's burden of proving either of its alternative theories stacked the deck entirely in favor of the state, unconstitutionally undermining the reliability of the verdict.



### A. The Pertinent Evidence.

The only substantial evidence against Petitioner in this case was his possession of the victim's property. This evidence did not implicate petitioner directly in the homicide. Petitioner could have found Mr. Grove alive by the side of the road and forcibly taken his car and credit cards from him. This would have made petitioner guilty of robbery but not homicide. Or petitioner could have come across Mr. Grove's dead body, or found his car unattended, and taken his car and credit cards. This would have made him guilty of theft, but not robbery or homicide. Petitioner's defense at trial was that the evidence at most established that petitioner had stolen Mr. Grove's property. J.A. at 23.

### B. The Pertinent Criminal Statutes.

The pertinent Arizona statute defining felony murder reads, in pertinent part, as follows:

> A murder which is . . . committed in . . . the perpetration of . . . robbery . . . is murder of the first degree.

A.R.S. §13-452. Petitioner argued before the Arizona courts that he had a due process right, under *Beck v. Alabama*, 447 U.S. 625 (1980), to jury instructions that would have permitted a conviction for robbery or theft as an alternative to a felony murder conviction. Theft is a lesser-included offense of robbery under Arizona law. *State v. Celaya*, 135 Ariz. 248, 251-52, 660 P.2d 849, 852-53 (1983).

### C. The Trial Court's Charge.

The trial court refused to instruct on robbery, or on theft. J.A. at 5; Tr. 7:1343. In essence, this ruling revoked petitioner's sole defense of guilt on a crime less than capital murder and forced him to argue that, of the two choices available to the jury, guilty of murder or not guilty, they should find the latter.

### D. The Arizona Supreme Court's Decision.

The Arizona Supreme Court recognized that the evidence would have supported a conviction for robbery. J.A. at 40. The same evidence necessarily would also have supported a theft conviction under Arizona law. *Celaya, supra*. The Arizona Supreme Court nevertheless rejected petitioner's contention by asserting the oft-repeated "rule" that "in Arizona there is no lesser-included offense to felony murder." *Id*.

The court cited three cases in support of this "no lessers" rule. Two of these cases *State v. LaGrand*, 153 Ariz. 21, 734 P.2d 563, *cert. denied* 484 U.S. 872 (1987) , and *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied* 474 U.S. 975 (1985), held that felony murder has no lesser-included offenses because the underlying felony supplies the *mens rea* necessary to satisfy the premeditation element of first degree murder. This is a *non sequitur*. It offers no explanation for why the underlying felony is not a lesser-included offense when there is a factual dispute regarding whether the defendant caused a death in



the course of committing the felony.[11] The third case cited, *State v. Leslie*, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985), held in a single sentence that burglary is not a lesser-included offense of felony murder, citing this Court's decision in *United States v. Garrett*, 471 U.S. 773 (1985). *Garrett*, which held that drug importation and "continuing criminal enterprise" are not the same crime for double jeopardy purposes, obviously lends no support to the rule. See *State v. Leslie*, 147 Ariz. at 50-51, 708 P.2d at 731-732 (Feldman, J., specially concurring) (*Gipson* "unrelated to the *Beck* principle"; because evidence would support verdict for underlying felony but not felony murder, underlying felony instruction should have been given).

### E. The Command of Due Process.

In a capital case, due process requires a State to permit the jury to consider a verdict of guilt of a lesser included non-capital offense, when the evidence would have supported such a verdict. *Beck v. Alabama*, 447 U.S. 625 (1980). The "unavailability of a lesser included

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[11] As between felony murder and robbery, the only disputed issue of fact was whether petitioner killed the victim. As between robbery and theft, the only disputed issue of fact was whether petitioner forcibly took the victim's property. Where "the charged greater offense requires the jury to find a disputed *factual element* which is not required for conviction of the lesser-included offense," the jury must have the option of convicting defendant on that lesser offense. *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980), quoting *Sansone v. United States*, 380 U.S. 343, 350 (1965).

instruction enhances the risk of an unwarranted conviction" and "diminish[es] the reliability of the guilt determination" which "cannot be tolerated in a case in which the defendant's life is at stake." *Id.*, 447 U.S. at 637-638. The goal of the *Beck* rule [thus] . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984); see also *Hopper v. Evans*, 456 U.S. 605, 610 (1982) (*Beck* requires jury instruction on lesser included offense where evidence warrants instruction and, without instruction on lesser, "a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime.").

*Beck* and *Spaziano* prohibited states from enforcing rules of law that diminished the rationality and reliability of capital verdicts by barring "third option" jury instructions. *Beck*, 447 U.S. at 637; *Spaziano*, 468 U.S. at 456. The Arizona "no lessers" rule arbitrarily diminishes the reliability of the result in precisely the same fashion as the practices at issue in *Beck* and *Spaziano*:

a. In *Beck*, this Court began its analysis by explaining that under Alabama law, the capital offense of "robbery . . . when the victim is intentionally killed by the defendant" was established by felony murder plus proof of intent to kill. Thus "[f]elony murder is . . . a lesser included offense of the capital crime of robbery-intentional killing." An Alabama statute prohibited instructions on lesser-included offenses in capital cases. But the Court held that the application of the Alabama statute violated due process.



b. In *Spaziano*, this Court held that the defendant was not entitled to the benefit of both a lesser-included offense instruction and an expired period of limitations on the lesser offenses. *Spaziano*, 468 U.S. at 454. Seven members of the Court agreed that the Constitution required the state to give the defendant the option of waiving the state-law statute of limitations, so that the jury could be instructed on the lesser-included offenses. *See id.* at 456-57; *id.* at 490 (Stevens, J., concurring in part and dissenting in part); *id.* at 467 (White, J., concurring in part and concurring in the judgment).

Here, as in *Beck* and *Spaziano*, the evidence would have permitted the jury to find that petitioner had committed a violent lesser-included felony, but not a capital murder. As the Arizona Supreme Court recognized, the jury rationally could have found that petitioner robbed Mr. Grove but that the State had not proved the additional element – death in the course of the felony – necessary for felony murder. J.A. at 40. This state of facts would have entitled petitioner to a robbery instruction (and in turn to a theft instruction) under all of the ordinary rules of lesser-included offense instructions accepted in Arizona, see *State v. Celaya, supra*, 660 P.2d at 852, and elsewhere, see *Schmuck v. United States*, 109 S.Ct. 1443, 1450 (1989), *except for* a wholly arbitrary unexplained *ipse dixit* pronouncement by the state Supreme Court saying simply "felony murder has no lessers." There is no greater justification for subordinating the demands of due process as perceived in *Beck* to such a state-law fiat than there was in *Beck* itself or in *Spaziano*.

Petitioner's due process rights have been violated whether or not robbery is technically a "lesser-included

offense" of felony murder under Arizona law. State courts are the ultimate arbiters of the meaning of state law, but that does not license them to manipulate it so as to defeat federal constitutional commands. *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979); *McKoy v. North Carolina*, 109 S.Ct. 1227, 1232 (1990). The principle of *Beck* does not depend on technicalities of state law. *Beck* instead teaches that technical state rules governing instructions on lesser-included offenses must give way to the due process demand for enhanced reliability and rationality in capital verdicts.

In the analogous context of double jeopardy limits on successive prosecutions, this Court held without dissent that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. *Harris v. Oklahoma*, 433 U.S. 682 (1977). Under the Oklahoma felony murder statute, as under Arizona law in petitioner's case, the State necessarily had to prove all of the elements of robbery in the felony murder prosecution. Under these circumstances, the Court "treated a killing in the course of a robbery as a separate offense, and the robbery as a species of lesser included offense." *Illinois v. Vitale*, 447 U.S. 410, 420 (1980). See also *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam). In precisely the same way, the robbery in this case is "a species of lesser included offense" for purposes of due process. That analysis is necessary here to vindicate *Beck*'s concern for reliability of results in capital cases.

The jury in petitioner's case was denied the "third option" of convicting petitioner of an offense, supported by the evidence, which lies between a capital conviction



for felony murder and an acquittal. No valid reason exists for denying the jury this option. Its forced choice on a capital charge cannot be squared with the due process principles enunciated by this Court in *Beck*.

## CONCLUSION

These two constitutional violations, mechanically applied under Arizona law, exacerbate each other. The state in petitioner's case was not only relieved of the burden of obtaining a unanimous verdict; but the jury was allowed no other option than to find petitioner guilty of some kind of homicide or acquit him. The procedures used to secure petitioner's conviction, upon which his death sentence is based, in no way meet the standards of reliability demanded by this Court in capital cases. The Judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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